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No. 06-1595

IN THE SUPREME COURT OF THE UNITED STATES

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE TENNESSEE EDUCATION ASSOCIATION AND THE METROPOLITAN NASHVILLE EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

Richard L. Colbert
(Counsel of Record)
Courtney L. Wilbert
COLBERT & WILBERT, PLLC
108 Fourth Ave. S., Suite 209
Franklin, TN 37064
(615) 790-6610

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STATEMENT OF INTEREST

The Tennessee Education Association ("TEA") and the Metropolitan Nashville Education Association ("MNEA") submit this brief as *Amici Curiae* in support of the Petitioner Vicky S. Crawford.[1] The TEA is a voluntary membership association and is Tennessee's largest professional organization. The TEA is the Tennessee state affiliate of the National Education Association ("NEA"). The TEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. Over sixty percent of the 72,000 teachers currently licensed to teach in the public schools of Tennessee are members of the TEA. In addition, there are more than 2,200 non-licensed educational support members in the TEA. Among the pertinent purposes and goals of the TEA are the defense of the civil and professional rights of educators and the securing and enforcement of fair and equitable employment procedures for educators.

The MNEA is a local affiliate of the TEA. The MNEA's members include licensed educators employed in the public schools throughout the Metropolitan Nashville Public Schools, the same

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amici* state that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *Amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

school system out of which this action arose. Specifically, MNEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. More than 3,000 licensed teachers in the Metropolitan Nashville Public Schools are members of the MNEA. In addition, as the recognized professional employees' organization for professional employees in the school system, the MNEA represents the interests of all 5,600 licensed educators in the Metropolitan Nashville Public Schools, including non-members, for purposes of collective bargaining negotiations under state law.[2] The MNEA therefore negotiates employment rights and compensation for all school system educators, represents educators in employment related matters, and insures that educators' rights are protected in personnel matters. The MNEA's mission is to promote excellence in the school system, seek community support for public education, secure economic and professional security for educators, maintain a strong united teaching organization, advance human and civil rights in education, and empower teachers.

Based on the functions and missions of the TEA and the MNEA, they are interested in this

[2] The MNEA is the recognized representative of all professional employees in the Metropolitan Nashville Public Schools pursuant to the Education Professional Negotiations Act, *Tenn. Code Ann. §§ 49-5-601 et seq.* Tennessee is a "right to work" State, so that membership in the MNEA is not required, and the MNEA has no authority to require payment of an agency fee by non-members.

precedent setting litigation which affects the rights of the professional employees that they represent. This case implicates the employment interests of teachers and others who may be called upon to testify or provide information in internal investigations of discrimination and harassment. Protecting teachers and others who participate in such internal investigations conducted by management is germane and central to the associational purposes of the TEA and the MNEA.

SUMMARY OF ARGUMENT

When an employee discloses information to her employer about sexual harassment by a supervisor, she is opposing a practice made unlawful by Title VII of the Civil Rights Act of 1964. Therefore, she should be protected from retaliation by her employer for opposing that unlawful practice. 42 U.S.C. § 2000e-3(a) makes it unlawful for an employer to discriminate against an employee because the employee "has opposed any practice made an unlawful employment practice by this title," or because the employee has participated in an investigation under Title VII.

As the Petitioner and the United States correctly argue, an employer's internal investigation of a sex harassment claim is an integral part of Title VII's enforcement scheme, and the protection of the "participation clause" rightfully extends to participation in such an internal investigation. The Sixth Circuit erred in ruling otherwise. The Sixth Circuit compounded its error when it held not only

that the "participation clause" did not extend to such an investigation, but also that the "opposition clause" afforded no remedy unless the opposition was active, consistent, and initiated by the employee. The Sixth Circuit's holding that an employee's cooperation with an employer's internal investigation is not protected under Title VII's non-retaliation provision will have detrimental effects on the rights and interests of educators, and others, called on to answer questions or provide information related to allegations of discriminatory conduct.

While *Amici* believe that the Sixth Circuit misinterpreted both the opposition and participation clauses, this brief will focus on the importance of protection under the opposition clause for *Amici's* members and others. Only by reading into the "opposition clause" a condition on the type of opposition that Congress did not place there has the Sixth Circuit denied that protection. This decision by the Sixth Circuit will discourage employees from answering questions by employers about sexual harassment and other discriminatory conduct and will undermine informal resolution of workplace discrimination issues.

The Sixth Circuit's decision turns the "opposition clause" on its head. The Sixth Circuit's decision creates a safe-haven of retaliatory conduct that is unprotected by the broad language of the opposition clause. That safe haven is contrary to the language and purposes of Title VII.

ARGUMENT

A. The Sixth Circuit wrongly concluded that opposition to an unlawful employment practice is protected only if that opposition is actively initiated by the employee and not if it takes the form of disclosures in response to employer inquiries.

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII or who participate in Title VII proceedings:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

The pertinent words, "*because he has opposed* any practice, made an unlawful employment practice by this title," are deliberately broad. The EEOC in its Compliance Manual declares that complaining to anyone about alleged discrimination against oneself or others is an example of covered opposition conduct. *EEOC Compliance Manual, Section 8-II(B)(2)*. An individual's internal complaint to a supervisor has been held to "surely" constitute

protected opposition. *Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 65 (2nd Cir. 1992); see also, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2nd Cir. 1993), cert. denied, 511 U.S. 1052 (1994).*

The broad protection for opposition is balanced by the requirement that the opposition be reasonable. Bad faith accusations, opposition conduct that so interferes with the performance of the job as to render the employee ineffective, and opposition that unreasonably disrupts the work place, are not protected.[3] These questions of reasonableness are matters that are proper for a trial court to address in determining whether the protection of the opposition clause is available. *See, e.g., Slagle v. County of Clarion, 435 F.3d 262, 266 (3rd Cir. 2006); Deravin v. Kerik, 335 F.3d 195, 2003 (2nd Cir. 2003); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989).*

But in this case, the Sixth Circuit did not base its decision on any conclusion about the reasonableness of Crawford's beliefs or the reasonableness of her manner of opposition.[4]

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[3] The EEOC declares that the employee must have a "reasonable and good faith belief" that the opposed practices were unlawful, and that the manner of opposition must be "reasonable" to balance the right of opposition and the public's interest with the employer's need for a stable and productive workplace. *EEOC Compliance Manual, Section 8-II(B)(3)(a) and (b).*

[4] Given the overt statements and actions of Dr. Gene Hughes described by the Sixth Circuit as well as the fact that Crawford's opposition occurred in the context of her employer's

Instead, the Sixth Circuit concluded that while a complaint made to a supervisor that is employee-initiated is protected opposition activity, a complaint made to a supervisor in response to the supervisor's inquiry is not.

Crawford was called in to meet with school system officials in connection with an investigation of sexual harassment by Dr. Gene Hughes, the school system's employee relations director. The Sixth Circuit noted that in response to questioning in the course of the investigation of Hughes' sexually harassing behavior, Crawford "told the investigators that Hughes had sexually harassed her and other employees." Crawford described in vivid detail the offensive words and actions to which Hughes subjected her. The conduct Crawford described included outrageous statements, inappropriate gestures, and, on at least one occasion, an inappropriate grabbing of Crawford by Hughes. After the investigation, Hughes was not disciplined, but Crawford and two other employees who made similar accusations against Hughes were discharged.

The Sixth Circuit considered claims by Crawford that she was terminated in violation of both the "opposition" and "participation" clauses of Section 704(a). The Sixth Circuit rejected Crawford's opposition clause claim as follows:

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internal investigation of Hughes' behavior toward a co-employee, it cannot be argued that Crawford's opposition was unreasonable.

"First, Crawford's actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: 'complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers.' *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII 'demands active, consistent "opposing" activities to warrant … protection against retaliation.' *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x. 607, 610 (6th Cir. 2004).

"Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition

> that we have held is required for protection under Title VII."

Crawford's actions clearly satisfied the Sixth Circuit's own *Johnson v. Univ. of Cincinnati* standard of "complaining to anyone … about allegedly unlawful practices." In the context of Hughes' especially egregious behavior as recounted by Crawford, it cannot plausibly be suggested that she did not oppose that behavior when she described it to her employer. There are no magic words that must be used in order for opposition to be protected.

The Sixth Circuit distinguished Crawford's complaints because she did not make them prior to the investigation of someone else's complaints and because she did not actively initiate those complaints but rather made them in response to questioning in the investigation. The Sixth Circuit determined that Crawford's opposition in an internal investigation of a co-employee's harassment complaint was not protected because it was not "active" or "consistent." The Sixth Circuit emphasized that Crawford did not "instigate or initiate" a complaint prior to cooperating in the internal investigation.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The plain language of the "opposition clause" prohibits retaliation against any person "because he has opposed any practice, made an unlawful

employment practice by this subchapter." There is no ambiguity in this language, in the context in which the language is used, or in the broader context of Section 704(a). There is no justification for the Sixth Circuit's addition of requirements that the opposition be "active," "consistent," or instigated or initiated by the protected employee.[5]

Ms. Crawford's detailed account of the sexual harassment she experienced at the hands of Hughes, shared in an investigative proceeding, satisfied the reasonableness requirement that applies to opposition clause claims. It was reasonable for Ms. Crawford to participate in the internal investigation launched by her employer. It was reasonable for Ms. Crawford to respond to questions posed by her employer in an honest and truthful manner. It was also reasonable that Ms. Crawford thought she was protected by Title VII's anti-retaliation provisions when she spoke as a witness in an internal sexual harassment investigation launched by her employer.

Ms. Crawford had an obligation, as an employee, to answer her employer's questions in an honest and truthful manner. There is simply no reason why the opposition clause should provide less protection to her than it would to someone who made the same complaints to the same investigators in some other context than an employer's investigation.

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[5] Even if the "opposition clause" were somehow ambiguous, the imposition of these additional restrictions upon reasonable opposition conduct as conditions for the protection of Section 704(a) would be inconsistent with "the broader context of Title VII and the primary purpose of § 704(a)'s coverage." *Robinson v. Shell Oil Co.*, *supra*, 519 U.S. at 346.

Regardless of the context or setting in which the complaints are made, someone who makes reasonable complaints of sexual harassment is entitled to the protection of the opposition clause. There is no statutory basis for the imposition of an "active initiation" requirement superimposed on the opposition clause.

The Sixth Circuit's decision requires that in order to be protected, opposition must be "active," "consistent," and "instigated or initiated" by the complaining party so that it may be described as "overt opposition." These requirements are found nowhere in the statutory language. The Sixth Circuit erred by imposing them.

To insure that there are no gaps in the protection against retaliation that Title VII affords to employees who complain about discrimination, this Court should reverse the Sixth Circuit's overly narrow reading of both the participation and opposition clauses. Recognizing the full scope of the "opposition clause" is critical to securing protection from retaliation not only for employees like Crawford whose disclosure of employer improprieties occurred in the context of an employer investigation, but also for employees whose disclosures are made independently of such an investigation.

B. The Sixth Circuit's decision undermines the purpose of Title VII's anti-retaliation provisions.

The purpose behind Section 704(a) is to prevent employers from taking actions that will deter employees from complaining about discrimination:

> "The anti-retaliation provision seeks to prevent employer interference with unfettered access to Title VII's remedial measures. It does so by prohibiting employer actions that are likely to 'deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345, 360 (2006) (citations omitted).*

Under the Sixth Circuit's decision, if two employees offered precisely the same sort of information in an employer's internal investigation, but one was summoned to provide information while the other volunteered to provide it, they would be treated entirely differently under the opposition clause. The one who volunteered to provide information might be protected because of her "active initiation" of opposition, while the one who was summoned would be unprotected.[6]

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[6] Even the employee who volunteered to provide information might not be protected under the Sixth Circuit's standards if

In an assortment of other circumstances, the Sixth Circuit's active initiation requirement could eliminate the protections of the "opposition clause." In a claim of retaliation for complaints made to co-employees, the complaining employee may not be protected if the conversation is initiated by the co-employee. An employee who signs a letter or petition may not be protected if someone else requested the employee's signature.

The Sixth Circuit's active initiation requirement also will undermine employers' internal resolutions of discrimination and harassment claims. Potential witnesses will be hesitant to respond to employer requests for information if they know that their responses will be unprotected because the employer initiated the exchange.[7] The harm resulting from such witness reluctance will be visited upon both employees and employers. Employees with legitimate claims of discrimination or harassment will be impaired in their ability to secure the basic guarantees of Title VII by the difficulty in obtaining corroboration from others who

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her complaint was quantitatively insufficient to constitute "active, consistent 'opposing' activities."

[7] The Sixth Circuit's decision places an employee like Crawford in an untenable position. Such an employee must either provide truthful information with knowledge that she will thereafter be without protection from retaliation since she did not actively initiate the exchange, or refuse to participate in the internal investigation and thereby be subject to possible termination for insubordination. Congress could not have intended that the "opposition clause" be read to turn internal employer inquiries into such a Hobson's choice for employees.

may have knowledge but are reluctant to share that knowledge for fear of retaliation. Employers who in good faith desire to resolve workplace discrimination issues will find that their ability to do so informally and internally is limited by the reluctance or resistance of employees who fear retaliation without recourse.

The EEOC has informed employers that anti-harassment policies are ineffective without assurances to employees that participation will not result in retaliation:

> "An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment *or provide information related to such complaints*. An anti-harassment policy and complaint procedure will not be effective without such an assurance." *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment By Supervisors (http//www.eeoc.gov/policy/docs/harassment.html)*.

The Sixth Circuit's decision, if left undisturbed, will produce precisely the result that the EEOC warns against in this guidance – it will render the employer's anti-harassment policy and complaint procedure ineffective.[8]

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[8] An employer's anti-harassment policy and complaint procedure may not satisfy the requirements of *Faragher* and

Not only do the Sixth Circuit's added requirements find no support in the language of the "opposition clause," those requirements undermine the purpose of the "opposition clause." The "opposition clause" encourages employees to address their complaints informally by insuring that informal opposition may not lead to retaliatory conduct. This protection from retaliation, in conjunction with the types of anti-harassment policies and procedures discussed in *Faragher* and *Ellerth*, should encourage employers and employees to resolve discrimination and harassment claims promptly and informally where possible. By limiting the protections of the "opposition clause," the Sixth Circuit's decision will discourage informal exchanges between employer and employee. The result will be an increase in costs and burdens to parties, the EEOC, and the courts as more complaints of discrimination and harassment must be resolved through formal charges and lawsuits.

The Sixth Circuit's decision does not further the Congressional policy underlying the anti-retaliation provisions of Title VII and is inconsistent with the plain meaning of the opposition clause. The Sixth Circuit's decision undermines the benefits to

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Ellerth if it does not protect employees from retaliation. *Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).* But the loss of the *Faragher* and *Ellerth* defense will only affect the claim under investigation by the employer. Witnesses will still be unprotected from retaliation. For unscrupulous employers, the Sixth Circuit's decision may well undermine the salutary effects of *Faragher* and *Ellerth*.

both employers and employees that flow from employers' informal and internal investigations. The Sixth Circuit's decision undermines the intended purposes of Section 704(a), contrary to its plain language and to the interpretation of that language by the EEOC, by removing its protections from employees whose complaints are in response to employer inquiries. The Sixth Circuit's decision adds to the "opposition clause" a vague requirement of "active, consistent" opposition, along with a display of "overt opposition" in the form of instigating or initiating a complaint. These requirements are not a part of the "opposition clause" and are irrational and inconsistent with the intended protection of the "opposition clause."

CONCLUSION

The TEA and the MNEA as *Amici Curiae* respectfully submit that the Sixth Circuit's decision should be reversed.

Respectfully submitted,

Richard L. Colbert
(Counsel of Record)
Courtney L. Wilbert
COLBERT & WILBERT, PLLC
108 Fourth Avenue South
Suite 209
Franklin, TN 37064
(615) 790-6610

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